SUPREME COURT, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-316

CHARLES D. KERN, *Petitioner,*

v.

COMMONWEALTH OF VIRGINIA

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No.

CHARLES D. KERN, *Petitioner,*

v.

COMMONWEALTH OF VIRGINIA

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Virginia rendered on the 27th day of June, 1974.

CITATIONS TO OPINIONS BELOW

The Supreme Court of Virginia rendered no opinion in the case. The Supreme Court of Virginia entered an order on the 27th day of June, 1974, rejecting petitioner's application for a writ of error. This order is attached to this Petition.

JURISDICTION

The judgment of the Supreme Court of Virginia, entered on the 27th day of June, 1974, is attached to this petition. The Supreme Court of Virginia is the

highest state court in the State of Virginia. Jurisdiction of this Court is invoked under Title 28 § 1257 of the United States Code.

QUESTION PRESENTED

Was not the petitioner denied due process of law under the Fifth and Sixth Amendments of the Constitution by the action of the Supreme Court of Virginia in affirming the judgment of the trial court which refused to allow petitioner to withdraw his plea of guilty prior to the imposition of sentence when the counsel who represented him at the time he entered the plea advised the court that he had misadvised the petitioner on his right to have witnesses on the motion to suppress and when his counsel candidly advised the court that he himself was a factual witness who should have testified at the motion to suppress?

STATEMENT OF THE CASE

The petitioner was indicted for unlawfully possessing marijuana with intent to distribute in violation of the Virginia Code, Title 54 § 524.1011(a). Petitioner filed a motion to suppress the narcotics which were seized and which formed the basis for the prosecution. This motion was denied by the trial judge on September 7, 1973. Four days later on September 11, 1973, the petitioner with counsel entered a plea of guilty. On November 9, 1973, twenty-nine days after the plea of guilty had been entered, the petitioner, through another counsel, moved to withdraw his guilty plea. The motion set forth no reasons and stated they would be given during the course of the oral hearing. The motion to withdraw came on for oral hearing on November 23, 1973. At this hearing the attorney who

had represented the petitioner at the time he entered his plea of guilty stated *inter alia* * * * "I would like to suggest there was a pretrial motion filed here to suppress certain evidence of which I had knowledge of and I gained that knowledge through the telephone by talking to the people at home, talking to the detectives while he was at the home on two occasions which I am embarrassed to suggest to the court that I should have been in a position to testify to those conversations at the pre-trial motion to suppress. I did not." (Transcript 7, proceedings of November 23, 1973.)

Petitioner's counsel further advised the court that "certain evidence was not produced at the pre-trial motion that ought to have been, namely my knowledge of what had transpired between the police department and Mrs. Kern, the defendant's wife. In that connection, I apologize for my error or omission there to the court for causing or may cause additional time and costs and energy to all parties concerned." (Tr. 8, proceedings of November 23, 1973.)

The counsel who had represented him at the time the plea of guilty was entered also candidly admitted on the record that he did not advise petitioner of the conflict which arose because of his dual position as a lawyer for petitioner and his position as a witness to factual matter which was material to the motion to suppress. The counsel who represented him at the time the plea of guilty was entered stated on the record, "I should have advised him and some other member of my firm or some other attorney should have argued the pretrial motion. In fact, to be very candid with the court, he wasn't aware of it until he in fact sought advice of other counsel, namely Mr. Fortkort" (Tr. 7 and 8). The attorney further stated on the record that

he did not advise petitioner adequately of his rights to produce witnesses at the motion to suppress (Tr. 9, proceedings of November 23, 1973). The trial judge denied the motion to withdraw the plea and the matter was continued for sentencing. The petitioner was sentenced on January 11, 1974 to eight years in the penitentiary, three years of which were suspended. The petitioner applied to the Supreme Court of Virginia for a writ of error which was denied on June 27, 1974. This judgment is the final judgment of the highest court in the State of Virginia.

STATUTES AND RULES INVOLVED

Fifth Amendment to the Constitution

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment to the Constitution

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

REASONS WHY THE WRIT SHOULD BE GRANTED

The refusal of the trial court to allow petitioner to withdraw his plea of guilty prior to sentence when the counsel who represented him at the time the plea was entered stated on the record that the petitioner was misadvised as to his rights to produce witnesses at the hearing, and was not advised that his counsel was a necessary fact witness in the hearing, deprived the petitioner of due process of law under this Court's ruling in McMann v. Richardson, 397 U.S. 768, 90 S.Ct. 1401, and Brady v. United States, 397 U.S. at 756, 90 S. Ct. 1473.

The statement of the case outlines the representations made by the petitioner's counsel at the time the plea of guilty was entered. We recognize that it is not sufficient for a criminal defendant to set aside a guilty plea entered on advice of counsel, to show that his counsel in retrospect may not have correctly evaluated the constitutional significance of certain historical facts, nor is it sufficient that it show that if counsel had pursued a certain factual inquiry such pursuit would have unearthed a possible constitutional infirmity in the proceedings. *Tollettson* v. *Henderson,* 411 U.S. 258, 93 S.Ct. 1602.

This case discloses a record where in addition to the petitioner's counsel candidly admitting on the record his failure to advise petitioner on substantial issues affecting his rights to effective assistance of counsel under the Sixth Amendment, we have the dual problem of an unrefuted record whereby the petitioner's counsel set forth that at the time the plea of guilty was entered and at the time the motion to suppress was heard, he was in possession of facts which made him a necessary fact witness at the motion to suppress and the petitioner was not so advised. This Court in *McMann* v. *Richardson, supra,* recognized that mere erroneous advice of an attorney in and of itself does

not afford grounds for setting aside a plea of guilty duly entered. This Court stated:

> Whether a plea of guilty is unintelligent and therefore vulnerable when motivated by a confession erroneously thought admissible in evidence depends as an initial matter, not on whether a court would retrospectively consider counsel's advice to be right or wrong, but on whether the advice was within the range of competence demanded of attorneys in criminal cases.

While this case does not involve a confession, the frank and candid statements of the petitioner's counsel who represented him at the motion to suppress and who represented him at the time the guilty plea was entered clearly establish that petitioner was denied effective assistance of counsel and due process of law, both at the motion to suppress and at the time the guilty plea was entered.

We think the present issue presented to this Court is not simply whether the trial judge abused his discretion, but whether petitioner was denied the basic elements of adequate representation on the only issue that was central and important to his case, namely, the motion to suppress. The record is also unrebutted with respect to the defendant's mental state, for when addressing himself to the court, the following appears:

> On the morning I pleaded guilty, I was not * * * it was my attorney's * * * my decision that morning. I was really in a state of * * * just disorder and my mind, by everything else, I mean, I just don't know what I wanted. I wasn't home when this action took place.

The state court decisional law on withdrawing a plea prior to the imposition of sentence is also very similar to the liberal rule followed in the federal courts. In

the leading case of *Parris* v. *Commonwealth,* 189 Va. 321, 52 S.E. 2d 872, the court stated:

> To the same effect is Reed v. Commonwealth, 98 Va. 817, 36 S.E. 399.
>
> The principle briefly announced in the above two decisions from this jurisdiction is more elaborately set out in 14 Am.Jur., "Criminal Law", sec. 287, at p. 961:
>
> > "As in other cases of discretionary power, no general rule can be laid down as to when a defendant will be permitted to withdraw his plea. The decision in each case must depend to a great extent on the particular attendant circumstances. Generally, however, it may be said that the withdrawal of a plea of guilty should not be denied in any case where it is in the least evident that the ends of justice will be subserved by permitting not guilty to be pleaded in its place. The least surprise or influence causing a defendant to plead guilty when he has any defense at all should be sufficient grounds for permitting a change of plea from guilty to not guilty. Leave should ordinarily be given to withdraw a plea of guilty if it was entered by mistake or under a misconception of the nature of the charge; through a misunderstanding as to its effect; through fear, fraud, or official misrepresentation; was made involuntarily for any reason; or even where it was entered inadvisedly, if any reasonable ground is offered for going to the jury."
>
> Under what circumstances the trial court should allow a plea of guilty to be withdrawn and one of not guilty substituted is well stated in Abbott, Criminal Trial Practice, 4th ed., sec. 118, at p. 212, where, among other things, it is said:
>
> > "The plea of guilty to a serious criminal charge should be freely and voluntarily made,

> and entered by the accused, without a semblance of coercion, and without fear or duress of any kind, and the accused should be permitted to withdraw a plea of guilty entered unadvisedly when application therefor is duly made in good faith and sustained by proofs, and a proper offer is made to go to trial on a plea of not guilty."

The unrefuted record therefore establishes that at the motion to suppress and when the plea of guilty was entered, the petitioner's assistance of counsel was no more than perfunctory and this has been consistently held by this Court to be insufficient to satisfy the due process requirements of the Fifth Amendment and the requirements of effective assistance of counsel embraced in the Sixth Amendment. See, *Powell* v. *Alabama,* 287 U.S. 45, 53 S.Ct. 55; *Avery* v. *Alabama,* 308 U.S. 444, 60 S.Ct. 321; *Glasser* v. *United States,* 315 U.S. 60, 62 S.Ct. 457.

The record above clearly establishes that the petitioner was denied due process of law and this Court should grant the writ of certiorari.

CONCLUSION

The only issue in dispute in this case was the validity of the search and hence the record in this case which is unrefuted and establishes clear violation of the petitioner's rights to effective assistance of counsel under the Sixth Amendment at the motion to suppress should prompt this court to grant the writ of certiorari.

Respectfully submitted,

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5205 Leesburg Pike
Baileys Crossroads, Va. 22041
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APPENDIX

APPENDIX

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 27th day of June, 1974.

The petition of Charles David Kern for a writ of error and supersedeas to a judgment rendered by the Circuit Court of Fairfax County on the 11th day of January, 1974, in a prosecution by the Commonwealth against the said petitioner for a felony (Count I), having been maturely considered and a transcript of the record of the judgment aforesaid seen and inspected, the court being of opinion that there is no reversible error in the judgment complained of, doth reject said petition and refuse said writ of error and supersedeas, the effect of which is to affirm the judgment of the said circuit court.

A Copy,

Teste:

HOWARD G. TURNER, Clerk

By: /s/ ALLEN L. LUCY
Deputy Clerk

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 25th day of July, 1974.

Record No. 740441

CHARLES DAVID KERN, *Plaintiff in error,*

against

COMMONWEALTH OF VIRGINIA, *Defendant in error.*

Order Staying Execution of Judgment

Upon consideration of the application of the plaintiff in error, by counsel, praying for a stay of execution of the judgment rendered herein on June 27, 1974, in order that he may have reasonable time and opportunity to present to the Supreme Court of the United States a petition for a writ of certiorari to review the judgment of this court, it is now ordered that the execution and enforcement of the judgment of this court in the above-styled case rendered on June 27, 1974, be, and the same is hereby, stayed, until the 25th day of September, 1974, on the expiration of which time the same may be enforced unless the case has been before that time docketed in the Supreme Court of the United States, in which event enforcement thereof shall be stayed until the final determination of the case by that court.

The above stay, however, is not to discharge the petitioner from custody, if in custody, or to release his bond if out on bail.

A Copy,

Teste:

/s/ H. FURUER
Clerk

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In The

Supreme Court of the United States

October Term, 1974

No. 74-316

CHARLES D. KERN,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO GRANT OF CERTIORARI

QUESTIONS PRESENTED

I.

Is The Petitioner's Claim Properly Before This Court?

II.

Did The Trial Court Abuse Its Discretion In Denying Petitioner's Motion To Withdraw His Guilty Plea?

STATEMENT OF THE CASE

Petitioner was indicted on two counts of feloniously possessing controlled drugs with intent to distribute.

On September 7, 1973 a hearing was held on petitioner's motion to suppress certain evidence seized at his home. At this hearing petitioner was represented by Thomas J. Morris, an attorney retained by petitioner. At this hearing petitioner called his wife as a witness in an attempt to establish the invalidity of the seizure (Transcript of 9-7-73, pp. 23-38). During this hearing Mr. Morris advised the trial judge that on the night of the seizure he had had a telephone conversation with petitioner's wife while the police were present. During this conversation Mr. Morris requested the police to get on an extension phone and he advised the police to leave the premises (Transcript of 9-7-73, p. 7). Also at this hearing it was stipulated that Mr. Morris had been called and had advised the police to leave the petitioner's premises (Transcript of 9-7-73, p. 30). After hearing the evidence the court denied petitioner's motion to suppress.

Thereafter on September 11, 1973, petitioner, again represented by Mr. Morris, entered a plea of guilty to one count of possession with intent to distribute, and the Commonwealth nolle prossed the second count (Transcript of 9-11-73, pp. 2-7).

On or about November 9, 1973, petitioner filed a motion to withdraw his guilty plea. This motion was apparently filed by Thomas A. Fortkort, another attorney retained by petitioner. A hearing was held on November 23, 1973, at which time attorney Thomas J. Morris appeared with petitioner, and Mr. Fortkort was not present.

During this hearing Mr. Morris assigned as the reason for allowing petitioner to withdraw his guilty plea the fact that he, Mr. Morris, possessed certain information which he had gained in a telephone conversation with the police at petitioner's home and that this information should have been

produced at the motion to suppress (Transcript of 9-23-73, pp. 6-10). At no point in this hearing did Mr. Morris suggest that his information would have been any different from that which Mrs. Kern had given nor to that which was stipulated at the time of the motion to suppress. At this hearing it was pointed out to the trial court that by accepting petitioner's plea of guilty the Commonwealth had radically changed its position. In reliance upon petitioner's plea of guilty the Commonwealth nolle prossed one count of possession of controlled drugs with intent to distribute (Transcript of 9-23-73, p. 11); certain witnesses of the Commonwealth who were prepared to testify earlier could no longer be counted upon (Transcript of 9-23-73, pp. 13 and 14); and on a separate felony charge petitioner had been allowed to enter a plea of guilty to a misdemeanor (Transcript of 9-23-73, p. 14). Petitioner's motion to withdraw his guilty plea was denied, and petitioner was subsequently sentenced on January 11, 1974.

Petitioner, through attorney Fortkort, filed a petition for appeal in the Virginia Supreme Court, which was denied by order of June 27, 1974.

ARGUMENT AGAINST GRANTING CERTIORARI

I.

Petitioner's Claim Is Not Properly Before This Court.

In the petition for certiorari the petitioner refers to the trial court abusing its discretion by denying petitioner's motion to withdraw his guilty plea, but has framed his argument in terms of ineffective assistance of counsel as a denial of due process of law in violation of the Fifth and Sixth Amendments of the United States Constitution (See Petition for Certiorari, pp. 2, 6, and 8).

In the Supreme Court of Virginia the petitioner's sole

argument on the point now being raised was directed at an abuse of discretion by the trial court. The assignment of error was as follows:

> "The Court committed error in refusing Defendant's request to withdraw his plea of 'guilty' prior to sentencing and prior to the completion of the probation officer's report." (Petition for Appeal, p. iv.)

The question presented to the Virginia Supreme Court was as follows:

> "DOES A COURT ABUSE ITS DISCRETION IN NOT ALLOWING A DEFENDANT TO WITHDRAW HIS PLEA OF GUILTY WHERE THE DEFENDANT INDICATES THAT THERE HAS BEEN SOME MISUNDERSTANDING AS TO THE EFFECT OF HIS PLEA OF GUILTY, AND WHERE THE TRIAL OF THE CASE WOULD IMPOSE NO ADDITIONAL DELAY IN CONCLUDING THE CASE AND WHERE THE COMMONWEALTH HAS MADE NO SHOWING THAT THE WITHDRAWAL OF THE PLEA OF GUILTY WOULD BE PREJUDICIAL TO THE COMMONWEALTH'S CASE?" (Petition for Appeal, p. 11.)

The Virginia Supreme Court has never been called upon to determine the issue being presented to this Court, that is, whether petitioner has been denied the effective assistance of counsel. In petitioner's appeal to the Virginia Supreme Court no due process claim was raised or alluded to nor was either the Fifth or Sixth Amendment ever mentioned. Petitioner is attempting to place before this Court an issue which has never been ruled upon by the Virginia Supreme Court.

It is well established that the United States Supreme Court will not decide Federal constitutional issues raised in the Supreme Court for the first time on review of State court decisions. *Rugendorf* v. *United States,* 376 U.S. 528

(1964); *Cardinale* v. *Louisiana*, 394 U.S. 437 (1969); *Hill* v. *California*, 401 U.S. 797 (1971).

II.

The Trial Court Did Not Abuse Its Discretion In Denying Petitioner's Motion To Withdraw His Guilty Plea.

Any request to allow a guilty plea to be withdrawn is directed to the sound discretion of the trial judge. See Rule 3A:25(d), Rules of the Supreme Court of Virginia; Rule 32(d), Federal Rules of Criminal Procedure; *Parris* v. *Commonwealth*, 189 Va. 321 (1949); *United States* v. *Del Valle-Rojas*, 463 F.2d 228 (9th Cir. 1972).

Upon appeal predicated on failure to permit a guilty plea to be withdrawn, the appellant, to have his conviction reversed must prove abuse of discretion by the trial judge. *United States* v. *Rivas*, 477 F.2d 139 (5th Cir. 1973); *United States* v. *Needles*, 472 F.2d 652 (2d Cir. 1972); *United States* v. *Benson*, 469 F.2d 222 (8th Cir. 1972); *United States* v. *Webster*, 468 F.2d 769 (9th Cir. 1972), *cert. den.* 410 U.S. 934 (1973); *United States* v. *Tabory*, 462 F.2d 352 (4th Cir. 1972).

In considering whether to grant the request to withdraw a plea of guilty the court must weigh the defendant's reason for withdrawal against the resulting prejudice to the government. *Farnsworth* v. *Sanford*, 115 F.2d 375 (5th Cir. 1940); *United States* v. *Harvey*, 463 F.2d 1022 (4th Cir. 1972), *cert. den.* 411 U.S. 972 (1973); *United States* v. *Del Valle-Rojas, supra.*

In the case at bar there was no showing in the trial court of any plausible or valid reason why petitioner should have been allowed to withdraw his guilty plea. Petitioner's counsel merely suggested that he personally possessed information which should have been presented at the time of the

motion to suppress. No hint was given as to the nature of this information, whether it would have been material, whether it would have been different from the evidence which was presented at the motion to suppress, or whether it would have been different from that which had been stipulated. A trial judge can hardly be asked to allow a withdrawal of the solemn plea in such a vacuum. On the other hand the Commonwealth showed that it had been substantially prejudiced by reliance upon the petitioner's plea. The Commonwealth had nolle prossed one charge, could no longer count on its witnesses, and petitioner had been allowed to plea to a misdemeanor on yet another felony charge. Certainly under these circumstances the trial court did not abuse its discretion in not permitting the guilty plea to be withdrawn.

CONCLUSION

It is respectfully submitted that petitioner's claim has never been presented in the same context to the Supreme Court of Virginia, and consequently is not properly before this Court. It is further submitted that the trial court did not abuse its discretion in not permitting the withdrawal of the guilty plea.

Wherefore, respondent prays that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, James E. Kulp, Assistant Attorney General of Virginia, counsel for the respondent in the captioned matter and a member of the Bar of the Supreme Court of the United States, do hereby certify that on or before the 12th day of December, 1974, I mailed three copies of the foregoing Brief in Opposition to Albert J. Ahern, Jr., 5205 Leesburg Pike, Baileys Crossroads, Virginia 22041, counsel of record for petitioner.

JAMES E. KULP
Assistant Attorney General

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-316

CHARLES D. KERN, *Petitioner,*

v.

COMMONWEALTH OF VIRGINIA

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO GRANT OF CERTIORARI

The Federal Constitutional Questions Were Substantially Presented to the Supreme Court of Virginia and, Therefore, the Questions Are Properly Before This Court.

The Respondent in its Opposition to the Petition for Certiorari asserts that the petitioner did not present the Federal questions embraced in his Fifth and Sixth Amendment contentions raised in his petition for certiorari and hence this court has no standing to pass on the issues which were not properly raised in the Supreme Court of Virginia. (Page 4 of Respondent's Brief in Opposition to Certiorari.)

While the counsel representing the petitioner in the Supreme Court of Virginia did not refer to the Fifth and Sixth Amendments in the caption of the argument, the conflict raised by the petitioner's trial counsel as a witness and as his position as trial counsel is set forth in the Petition for the Appeal to the Supreme Court of Virginia, under the very question quoted by the respondent. The Petitioner made the following statement to the Supreme Court of Virginia in his petition for an appeal:

> "It is our *view that the conflict of counsel acting as a counsel and witness;* the statement of the defendant as to his state of mind immediately prior to his entering a plea of guilty; and the indication that the *defendant may not have realized that he was waiving his right to test Commonwealth's evidence by appeal are sufficient justification to allow withdrawal of his guilty plea.*" (Emphasis added.)

Petitioner's appellate counsel in the Supreme Court of Virginia in the argument under the very heading quoted by the respondent, *supra,* raised further Fifth and Sixth Amendment arguments by stating:

> "In the instant case, previous counsel for the defendant Kern advised the court that his client's desire to withdraw his plea of guilty stemmed from counsel's error in not explaining to the defendant that he was entitled to call witnesses at a prior motion to suppress. Counsel further indicated to the court that he was a material witness to the events surrounding the entry of the police officers into the Kern household and that he had not been representing the defendant and that had he not been representing the defendant, he would have appeared as a witness at that hearing." (Pp. 11 and 17 of petition brief on appeal to the Supreme Court of Virginia.)

Again in the argument under this very point that the respondent contends did not raise petitioner's rights to effective counsel under the Sixth Amendment and Due Process under the Fifth Amendment, the petitioner's counsel in the State Supreme Court of Virginia quoted the statement of the petitioner's trial counsel in the trial court showing not only was the issue raised on appeal but that it was raised in the trial court when the trial court was advised that unless the plea were withdrawn the trial counsel would be faced with a habeas corpus situation and collateral attack, on the judgment. This is reflected as follows:

> "MR. MORRIS: Your Honor, for the record, in reference to the instructions of the Court, might I respectfully suggest that along with the jurisdictional grounds, if any, that bear possible, that could be shown, I also advised him, the Defendant, Mr. Kern, that if for any reason that he subsequently found out, on my advice or other factors, that he would have a right to file a writ for a petition for habeas corpus. I bring that to the attention of the Court so we just don't eliminate that fact, and I did advise him of the facility of that writ." (Page 12, Petitioner's Brief on Appeal to the Supreme Court of Virginia.)
>
> "THE COURT: Well, of course, if there are facts on the ground for habeas corpus that exist, he would certainly have a right to file that. But insofar as appealing this particular decision of the case, and other matters in jurisdiction.
>
> "MR. MORRIS: It goes to jurisdiction.
>
> "THE COURT: It forecloses any but jurisdictional. (Tr. 6, 7, 9/11/73)."

We must assume that the Supreme Court of Virginia read the entire Petition for an Appeal. The presentation of the Federal questions to the Supreme Court of Virginia is not controlled solely by the form of the

question posed in the brief, but the entire argument must be considered in determining whether the Federal questions have been presented. It inescapably follows that in connection with the whole issue of withdrawing the guilty plea, there was presented to the Supreme Court of Virginia not only the abuse of discretion argument, but also the constitutional arguments under the Fifth and Sixth Amendments as a result of the conflicting position of the petitioner's trial counsel in the dual role of a fact witness and advocate plus his admission to the Court that he had not adequately advised the petitioner on the issues with respect to the hearing on the motion to suppress.

In *Bacheeleer* v. *Maryland,* 90 S.Ct. 1312, 397 U.S. 564, the Supreme Court stated:

> "When a claim of a constitutionally protected right is involved it 'remains our duty . . . to make an independent examination of the whole record'." *Cox* v. *Louisiana,* 379 U.S. 536, 85 S.Ct. 453.

If there is any doubt as to whether the judgment of the Supreme Court of Virginia is predicated on the non-Federal ground, which in this case would be the simple argument that the trial judge abused his discretion, or whether it also resolved the Federal question involving the Fifth and Sixth Amendments this court has in the past vacated the judgment of the State Court and remanded the cause to that court for further proceedings to determine whether the Federal question was resolved by the highest state appellate court. See, *California* v. *Krivda,* 93 S.Ct. 32, 409 U.S. 33. In *Department of Mental Hygiene of California* v. *Kirchner,* 380 U.S. 194, 85 S.Ct. 871, this Court stated:

> "While we might speculate from the choice of the words in the opinion and the authorities cited by the court which provision was the basis for the

judgment of the state court, we are unable to say with any degree of certainty that the judgment of the California Supreme Court was not based on an adequate and independent non-Federal ground. . . ."

* * *

"This Court is always wary of assuming jurisdiction of a case from a state Court unless it is plain that a Federal question is necessarily presented and the party seeking review here must show that we have jurisdiction of the case. . . . For reasons that follow we conclude that further clarifying proceedings in the California Supreme Court are called for under the principle stated in *State of Minn.* v. *National Tea Co.,* 309 U.S. 551, 60 S.Ct. 676."

While the petitioner's brief to the State Supreme Court of Virginia could certainly have been more precise in referring specifically to the Fifth and Sixth Amendments, the entire argument presented these issues and we must presume that the Supreme Court of Virginia read and passed on all the issues raised in the argument.

In the event there is any doubt in the court's mind as to whether the Supreme Court of Virginia did pass on the Federal question posed under the Fifth and Sixth Amendments, and if the Court feels there is an ambiguity as to whether the appeal was decided solely on the non-Federal grounds involving the alleged abuse of discretion, then this Court should follow its pronouncement in *State of Minn.* v. *National Tea Co.,* 309 U.S. 551, 60 S.Ct. 676, and *Department of Mental Hygiene of California* v. *Kirchner,* 380 U.S. 194, 85 S.Ct. 871, and vacate the judgment of the Supreme Court of Virginia, remand the cause to that court with directions to clarify whether their denial of the appeal

resolved the Federal question raised by the Fifth and Sixth Amendments or whether their judgment was predicated solely on other independent state grounds.

We feel that a reading of the Petition on Appeal to the State Supreme Court of Virginia substantially raised arguments under the Fifth and Sixth Amendments to that court such that they can properly be presented to this Court for judicial review.

CONCLUSION

We ask this Court upon consideration of the briefs, to grant the petition for certiorari, but in the event this court harbours any doubts with respect to whether the Federal question was presented and decided by the Supreme Court of Virginia, we ask this Court to remand the cause to the Supreme Court of Virginia with directions to clarify whether the Federal question on the basis of the court's judgment or whether it rested on other independent state grounds.

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